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No. 90-504

In the Supreme Court of the United States

OCTOBER TERM, 1990

FLEET FACTORS CORP., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ANNE S. ALMY
JENNIFER A. HAVERKAMP
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) requires the owner or operator of a facility to compensate the government for the government's expenses in responding to a release or threatened release of hazardous substances. § 107, 42 U.S.C. 9607. CERCLA exempts from the definition of an "owner or operator" a person who "without participating in the management" of a facility holds indicia of ownership to protect his security interest in the facility. § 101(20)(A), 42 U.S.C. 9601(20)(A). In this case, the government sought response costs from petitioner, a secured lender, and the district court denied motions for summary judgment on the ground that there were genuine issues of material fact as to petitioner's participation in the management of the facility.

The question presented is whether the court of appeals erred in affirming the district court's order denying petitioner's motion for summary judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 901 F.2d 1550. The opinion of the district court (Pet. App. 21a-34a) is reported at 724 F. Supp. 955.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on May 23, 1990, and a petition for rehearing was denied on July 17, 1990 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on September 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9601 *et seq.*, enlarged the Environmental Protection Agency's (EPA's) authority to deal effectively with the release of hazardous substances into the environment. Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), EPA may take direct "response" actions to abate any actual or threatened release of any hazardous substance. 42 U.S.C. 9604(a)(1). In order to pay for federal response actions, Congress has established the Hazardous Substance Superfund. See 26 U.S.C. 9507. CERCLA also provides that the federal government may bring cost recovery actions pursuant to Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A), to replenish the fund when EPA has expended money in performing response actions.

To recover response costs under Section 107 of CERCLA, the government must establish four elements: (1) the defendant falls within one or more of the classes of liable persons described in Section 107(a); (2) the site is a "facility" as defined in Section 101(9); (3) a "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (4) the release or threatened release has caused the United States to incur "response costs." 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984, 991-992 (D.S.C. 1984), aff'd *sub nom. United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).[1] Only the first of these four

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[1] It is well settled that responsible parties are strictly liable under CERCLA. *E.g.*, *Monsanto*, 858 F.2d at 167; *Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). In addition, they are jointly and severally liable when the en-

elements is at issue in this petition and the underlying appeal.

Section 107(a) establishes four broad classes of liable persons: (1) the owners and operators of hazardous substance facilities and sites; (2) those persons who owned or operated a facility at the time hazardous substances were disposed of at that facility; (3) those persons who arranged for disposal or treatment of the hazardous substances; and (4) those persons who transported the hazardous substances and selected the disposal facility. 42 U.S.C. 9607(a)(1)-(4)

In establishing broad liability for owners of hazardous substance facilities under Section 107(a)(1) and (2), Congress recognized the need to protect those persons who would otherwise be liable because of their ownership interest in a facility, but who held indicia of ownership merely to protect security interests. Accordingly it enacted the "secured creditor exemption" of Section 101(20)(A), which excludes from the definition of an owner or operator

> * * * a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. 9601(20)(A). As Representative Harsha (who introduced the secured creditor amendment) explained, "This change was necessary because the original definition [of owner] inadvertently subjected those who hold title to a vessel or facility, but do not participate in the management or operation and are not otherwise affiliated with the

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vironmental harm is indivisible. *E.g., O'Neil* v. *Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Monsanto*, 858 F.2d at 171; *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983).

person leasing or operating the vessel or facility, to the liability provisions of the bill." See House Debate on H.R. 85, 96th Cong., 1st Sess. (1979) (Sept. 18, 1980), *reprinted in* 2 Staff of Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the CERCLA* 889, 945 (Comm. Print 1983) [hereinafter *Leg. Hist.*].[2]

2. The United States filed a Section 107 cost recovery action against potentially responsible parties, including petitioner Fleet Factors Corporation, to recover the costs EPA had incurred in cleaning up, and preventing further release of, hazardous substances at the Swainsboro Print Works (SPW) in Emanuel County, Georgia. SPW is an inactive, bankrupt cloth printing facility located near public water wells and private residences. EPA spent approximately $375,000 in a two-stage cleanup of hazardous substances at the site, including vats of sodium cyanide, storage tanks of caustic soda, approximately 700 rusty, leaky 55-gallons drums of dyes and chemicals, and 44 truckloads of friable asbestos. Pet. App. 2a-3a, 25a.

After extensive discovery, the United States and petitioner filed cross-motions for summary judgment. In its motion, the United States primarily argued that petitioner was liable under Section 107(a)(2) as either an owner or operator of the SPW facility at the time hazardous substances were disposed of at that facility.[3] The government

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[2] The secured creditor exemption was first introduced into the House version of CERCLA, H.R. 85, as an amendment to clarify the definition of "owner" and remained part of that definition throughout successive versions of the bill; the definition of "operator" was an entirely separate provision. See H.R. 85, *reprinted in* 2 *Leg. Hist.* 1021-1022. The Senate version, which provided a definition of "owner or operator", lacked a secured creditor exemption. S. 1480, 96th Cong., 1st Sess. (1979) (as reported), *reprinted in* 1 *Leg. Hist.* 470. The secured creditor exemption was adopted as part of the definition of that term.

[3] The United States also asserted that petitioner could be held liable as the current owner or operator of the SPW facility, 42 U.S.C.

based its claim on extensive evidence of petitioner's involvement in SPW's affairs before and after SPW ceased printing operations in February 1981, and on petitioner's control of the defunct facility during the three years that followed. See Pet. App. 17a-18a, 27a-29a. Petitioner invoked the CERCLA Section 101(20)(A) "secured creditor" exemption from owner liability. Petitioner contended that it was merely a secured creditor holding indicia of ownership whose involvement in SPW's affairs did not constitute participation in management. See Pet. App. 9a-10a, 22a, 28a.

The district court denied the United States' and petitioner's motions for summary judgment. Pet. App. 33a. The court first summarized the undisputed facts in this case, which showed among other things that: (1) petitioner held a security interest in SPW's facility, equipment and inventory; and (2) when SPW filed for bankruptcy protection and ceased operations, petitioner foreclosed on its security interest in some of the SPW's equipment and inventory, and contracted with others to sell and remove those items. *Id.* at 23a-24a. The court stated that there was a "genuine dispute" as to the actions of petitioner's agents in handling and disposing of hazardous substances at the site. *Id.* at 24a-25a.

The court concluded that petitioner was not a present owner of the SPW facility (Pet. App. 27a; see note 3, *supra*), and turned to the question whether petitioner qualified for the secured creditor exemption. The court stated:

> I interpret the phrases "participating in the management of a . . . facility" and "*primarily* to protect his

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9607(a)(1), under the definition set forth in 42 U.S.C. 9601(20)(A)(iii). The district court and court of appeals rejected that argument (Pet. App. 8a-9a, 27a), which is not at issue in this petition.

> security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

Id. at 28a. The court concluded that petitioner did not participate in the management of SPW prior to the time petitioner's agents entered the facility to sell and remove equipment. *Id.* at 29a. It concluded, however, that petitioner's and its agents' subsequent activities raised genuine issues of material fact as to whether petitioner was entitled to the secured creditor exemption, which precluded entry of summary judgment for either party. *Id.* at 29a-30a.

3. On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals affirmed the district court's denial of petitioner's motion for summary judgment and remanded the case for further proceedings. Pet. App. 1a-20a. The court of appeals specifically agreed with the district court "that the facts alleged by the government with respect to Fleet's involvement after Baldwin [petitioner's agent] entered the facility were sufficent to preclude the granting of summary judgment" as to petitioner's entitlement to the secured creditor exemption. *Id.* at 12a-13a. See also *id.* at 17a, 19a-20a.[4]

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[4] The court of appeals also concluded that there was a genuine issue of fact as to whether petitioner participated in SPW's management between the time SPW ceased printing operations and the time petitioner contracted with an agent to auction SPW's equipment and fixtures. Pet. App. 17a-18a. The court of appeals accordingly determined that the district court "erred in construing the secured creditor exemption to insulate Fleet from CERCLA liability for its conduct prior to June 22, 1982." *Id.* at 19a-20a.

Although the court of appeals affirmed the district court's denial of petitioner's motion for summary judgment, it also indicated that a secured creditor could participate in the management of the facility, for purposes of CERCLA Section 101(20)(A), even if it did not become involved in day-to-day management of the business. The court stated that

> a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.

Pet. App. 14a. The court further stated that, in any event, under the government's allegations, petitioner's "involvement in the financial management of the facility was pervasive, if not complete." *Id.* at 17a-18a. Indeed, the court explained that the government's allegations, if proven, would permit the district court to find not only that petitioner was an "owner" that is ineligible for the "secured creditor" exemption, but also—as an alternative basis of liability—that petitioner's extensive involvement in SPW's management qualified petitioner as an "operator" of SPW. *Id.* at 10a n.6, 18a-19a.[5] The court of appeals accordingly remanded the case to the district court to resolve the disputed issues of fact. *Id.* at 20a.

ARGUMENT

This case is in an interlocutory posture. Indeed, as the court of appeals suggested, it may be resolved on remand without reaching the question presented in the petition for a writ of certiorari. The court of appeals' decision raises a

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[5] The court noted that during oral argument, petitioner "virtually conceded operator liability for its conduct with respect to the facility" (Pet. App. 19a n.15).

narrow issue of statutory construction and does not conflict with any decision of this Court or another court of appeals. Petitioner and its amici essentially seek an advisory opinion from this Court on a matter that is not ripe for this Court's review and, moreover, may be affected by developing legislative and administrative action.

1. The court of appeals affirmed the district court's denial of motions for summary judgment and remanded the case for further proceedings. Under this Court's established practice, review of this interlocutory ruling is inappropriate. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.").

Indeed, it would be particularly inappropriate for this Court to grant interlocutory review in this case. As the court of appeals recognized, petitioner based its motion for summary judgment on the contention that petitioner, as a matter of law, had not "participat[ed] in the management" of SPW (CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A)). The court of appeals and the district court both concluded that petitioner had failed to establish the absence of a genuine factual dispute as to whether petitioner had participated in the management of SPW. See Pet. App. 4a, 17a-19a, 25a-26a, 28a-30a. This Court does not normally review concurrent findings of fact by two lower courts. *E.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). This Court should be even more reluctant to interfere with ongoing proceedings by con-

ducting an interlocutory review of concurrent determinations by two lower courts that a genuine factual dispute *exists*.

Petitioner, at bottom, is simply displeased with the court of appeals' description of the reach of the secured creditor exemption, stating that the court of appeals' decision "makes it extremely difficult for financial institutions to determine how they can protect their secured loans without incurring massive liability." Pet. 5. Petitioner contends (*ibid.*) that "it is important for this Court to clarify the reach of the CERCLA liability scheme" because "financial institutions have been relying" on the language in other cases, such as *United States* v. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985). "This Court, however, reviews judgment, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Moreover, petitioner's preferred language would not produce a different result in this case. The district court applied the standard set forth in *Mirabile* and nevertheless denied petitioner's motion for summary judgment. Pet. App. 28a.

Beyond these formidable problems, this Court's interpretation of the secured creditor exemption would be purely advisory at this juncture. As the court of appeals observed and petitioner "virtually conceded" (Pet. App. 18a-19a & n.15), the government's factual allegations, if proven, "would pass the threshold for operator liability under section 9607(a)(2)." Thus, the court of appeals' interpretation of the secured creditor exemption, insofar as it is challenged by petitioner, may prove to be immaterial in determining petitioner's liability. Indeed, the government opposed petitioner's request for interlocutory appeal on the ground, among others, that on the present record the court of appeals could not dispositively resolve the question of secured creditor liability in this case. See

Memorandum of the United States in Opposition to Petitioner Fleet Factors Corporation's Application to Permit Interlocutory Appeal (Jan. 10. 1989). It would obviously be inappropriate for this Court to undertake to address the subject in the absence of a concrete factual setting.

2. Even if this case were not interlocutory, it would not be ripe for this Court's review. The issue that petitioner wishes resolved is a narrow question of statutory construction that does not conflict with any decision of this Court or another court of appeals. Petitioner and its amici concede that only one other court of appeals—the Ninth Circuit—has thus far encountered the question. See *In re Bergsoe Metal Corp.*, 910 F.2d 668 (1990). They are plainly wrong in asserting that there is a "tension" or "conflict" between the court of appeals' decisions. Pet. 6; American Bankers Ass'n Br. 5 n.3; American College of Real Estate Layers Br. 17; Bank of Boston Br. 26-30.

In *Bergsoe,* the shareholders of a bankrupt recycling company sued a municipal corporation under CERCLA alleging that the municipal corporation—which had issued revenue bonds for the recycling company—was responsible, as an owner, for the cleanup of hazardous wastes at the recycling site. 910 F.2d at 670. The bankruptcy court granted summary judgment in favor of the muncipal corporation and the district court affirmed. *Ibid.* The Ninth Circuit affirmed the district court's decision, holding there was no genuine factual dispute that the municipal corporation "holds indicia of ownership primarily to protect its security interest and that it did not participate in the management of the Bergsoe recycling plant." *Id.* at 673. The Ninth Circuit acknowledged the standard that the Eleventh Circuit proposed in this case for determining whether a secured creditor has participated in the management of a facility. *Id.* at 672. The Ninth Circuit concluded,

however, that it could "leave for another day" the determination of the "precise parameters of 'participation' " that would render a secured creditor liable under CERCLA. *Ibid.* The court explained:

> As did the Eleventh Circuit in *Fleet Factors,* we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes.

Id. at 673 n.3. Unlike the Eleventh Circuit in *Fleet Factors,* the Ninth Circuit found no evidence that the secured creditor exercised actual management authority. It accordingly affirmed the entry of summary judgment. *Id.* at 673.

Thus the reasoning of the Ninth Circuit is entirely consistent with that of the Eleventh Circuit. A secured creditor is entitled to summary judgment if the creditor shows, beyond factual dispute, that it did not participate in the management of the facility. Petitioner in this case, unlike the secured creditor in *Bergsoe*, simply failed to establish the absence of a factual dispute.[6]

3. Petitioner and its amici also contend that the court of appeals' decision has increased the prospect of lender

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[6] Petitioner and its amici attempt to create the impression of a circuit conflict by arguing that the Eleventh Circuit's standard would permit liability in the absence of actual management participation. See Pet. 6, 9-10; American Bankers Ass'n Br. 5 n.3; Bank of Boston Br. 27-28. Whatever the scope of the Eleventh Circuit's standard, it clearly requires—as the Ninth Circuit expressly recognized, *supra*—actual participation in management. See Pet. App. 14a ("[A] secured creditor will be liable if *its involvement with the management of the facility* is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." (emphasis added)). One cannot create a circuit conflict simply by eliding the portion of a court's holding that indicates accord. See American College of Real Estate Lawyers Br. 17.

liability and thereby caused "potential harm to the nation's economy," "wreaked havoc upon commercial practice," and "sent a shock wave throughout the country." Pet. 7, 10-14; American Bankers Ass'n Br. 5, 9; American College of Real Estate Lawyers Br. 3. They offer no evidence to support their concerns, which indeed are premised on an overly broad (and unrealistic) reading of the Eleventh Circuit's standard. See note 6, *supra*. Both the Ninth Circuit and the Eleventh Circuit interpreted the secured creditor exemption in a manner that permits a lender to "monitor[] any aspect of a debtor's business" and "become involved in occasional and discrete financial decisions relating to the protection of its security interest." Pet. App. 15a; see also 910 F.2d at 672-673. Moreover, petitioner's objection to the use of inferences in determining the scope of management participation (Pet. 9) is misplaced. The court found no need to rely on inferences in this case. See Pet. App. 18a n.13.[7]

The lending community's need for this Court's advice on the scope of the secured creditor exemption is further diminished by the fact that the government has rarely sought to hold lenders liable under CERCLA and—as demonstrated in this case—has generally sought such relief

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[7] Petitioner also contends (Pet. 11-13) that the court of appeals' interpretation of a lender's potential liability under CERCLA is inconsistent with the scope of a lender's liability in other legal contexts. Congress, however, enacted CERCLA to provide a comprehensive federal system of liability appropriate to the problem at hand. Thus, other principles of lender liability are not dispositive of a lender's potential liability under CERCLA. In any event, it is not clear that those other principles would absolve petitioner in this case. Petitioner also speculates that the court of appeals' decision might "expose[] lenders to substantial risk under other doctrines of lender liability" (Pet. 13). Petitioner does not contend, however, that it faced conflicting obligations in this case.

only where the lender's participation in the management of the facility is extensive. Moreover, to the extent that clarification of the law is needed, other more appropriate fora are available. Several bills were introduced during the 101st Congress that address the issue of lender liability.[8] In addition, EPA has initiated an effort to develop a rule that would provide guidance to commercial lenders holding mortgage-type indicia of ownership.[9] Thus, even if the issue petitioner presents were otherwise ripe for this Court's examination, the Court might find it advisable to await the outcome of the legislative and administrative proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ANNE S. ALMY
JENNIFER A. HAVERKAMP
Attorneys

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[8] See, *e.g.*, H.R. 4494, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H1505 (daily ed. Apr. 4, 1990); S. 2827, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. S9171 (daily ed. June 28, 1990). We anticipate that similar legislation will be introduced in the 102d Congress.

[9] See Prepared Statement of James M. Strock, EPA Assistant Administrator for Enforcement, presented in *Hearing on H.R. 4494 Before the House Subcomm. on Transportation and Hazardous Materials of House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (Aug. 2, 1990). We have lodged copies of the prepared statement with the Clerk of the Court.

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